



FEDERAL TRADE COMMISSION

[File No. 172 3092]

Tapjoy, Inc.; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY**

INFORMATION section below. Please write “Tapjoy, Inc.; File No. 172 3092” on your comment, and file your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Matthew H. Wernz (415-848-5125), Midwest Regional Office, John C. Kluczynski Federal Building, 230 South Dearborn Street, Suite 3030, Chicago, IL 60604.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. Write “Tapjoy, Inc.; File No. 172 3092” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Due to the COVID-19 pandemic and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website.

If you prefer to file your comment on paper, write “Tapjoy, Inc.; File No. 172 3092” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the <https://www.regulations.gov> website—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at <http://www.ftc.gov> to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an agreement containing a consent order from Tapjoy, Inc. ("Tapjoy"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Tapjoy operates an advertising platform within mobile gaming applications. On the platform, Tapjoy promotes offers of in-app rewards (e.g., virtual currency) to consumers who complete an action, such as taking a survey or otherwise engaging with third-party advertising. To induce consumers to engage with third-party advertisers, Tapjoy offers in-app rewards in the form of a specified amount of virtual currency that can be used in the in-app games. However, in many instances, Tapjoy never issued the promised reward to consumers who complete an action as instructed, or only issued the currency after a substantial delay. Consumers who attempt to contact Tapjoy to complain about missing rewards have found it difficult to do so, and even consumers who have been able to submit a complaint nevertheless did not receive the promised reward.

The Commission's proposed complaint alleges that Tapjoy has violated Section 5 of the FTC Act. In particular, the proposed complaint alleges that Tapjoy has represented that consumers will receive a reward of virtual currency upon completion of a specific action when, in many instances, that representation was false, misleading, or not substantiated at the time the representation was made.

The proposed order contains injunctive provisions addressing the alleged deceptive conduct. Part I.A of the proposed order prohibits Tapjoy from making the misrepresentations alleged in the complaint. Part I.B requires Tapjoy to make certain disclosures, specifically that its advertisers determine whether rewards are likely to issue, and when consumers are likely to receive rewards. Part I.C requires Tapjoy to obtain specified agreements from the associated advertiser before a reward is promoted or offered. Part I.D of the proposed order requires Tapjoy, before a reward is promoted or offered, to obtain the materials used to promote or offer the reward, to use those materials to attempt to obtain the reward, to validate the accuracy of those materials, and to validate that the reward is delivered promptly or that any delay is disclosed. Part I.E requires Tapjoy to provide a prominently disclosed and easy-to-use method by which consumers may submit support requests. Part I.F requires Tapjoy to investigate patterns of customer support requests or other information indicating that a particular promotion or offer of a reward has inaccurate instructions or is failing to deliver the reward.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgments of the order. Part III requires Tapjoy to notify the Commission of changes in corporate status and mandates that the company submit an initial compliance report to the Commission. Part IV requires the company to create certain documents relating to its compliance with the order for 10 years and to retain those documents for a 5-year period. Part V mandates that the company make available to the Commission information or subsequent compliance reports, as requested.

Finally, Part VI states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter

Summary

- The explosive growth of mobile gaming has led to mounting concerns about harmful practices, including unlawful surveillance, dark patterns, and facilitation of fraud.
- Tapjoy's failure to properly police its mobile gaming advertising platform cheated developers and gamers out of promised compensation and rewards.
- The Commission must closely scrutinize today's gaming gatekeepers, including app stores and advertising middlemen, to prevent harm to developers and gamers.

The video game business has solidified its place as a fixture of America's entertainment industry. During the pandemic, revenues in the sector have reportedly eclipsed those of the sports and film businesses combined.¹ This period has brought about a massive increase in mobile gaming app installs and spending, cementing gaming as a major magnet for Americans' attention.² The latest industry offerings rely on deeper social

¹ Ben Gilbert, *Video-game industry revenues grew so much during the pandemic that they reportedly exceeded sports and film combined*, BUSINESS INSIDER (Dec. 23, 2020), <https://www.businessinsider.com/video-game-industry-revenues-exceed-sports-and-film-combined-idc-2020-12>.

connectivity features and facilitate content creation by players. Americans are hosting birthday parties through gaming apps, and tens of millions have attended concerts by major artists on Fortnite and Roblox.³

Mobile gaming is the fastest growing segment of the market, where revenues are primarily generated through in-app purchases and advertising. Importantly, this segment is characterized by a unique market structure dominated by new gatekeepers, particularly app stores and advertising middlemen. This structure is rightfully under more intense scrutiny, given the challenges facing developers and the downstream practices that can harm gamers.

Against this backdrop, the Federal Trade Commission evaluates an appropriate remedy to address conduct of Tapjoy, a mobile advertising platform that connects gamers, game developers, and advertisers. As detailed in the Commission's complaint, Tapjoy's practices allowed users to be cheated of promised rewards, and developers to be cheated of promised compensation. The proposed settlement does not remedy these past harms, but will require Tapjoy to better police its platform to prevent abuses going forward.⁴

Tapjoy's Middleman Misconduct

Tapjoy is a major mobile advertising platform that acts as a middleman between advertisers, gamers, and game developers. The platform woos developers into integrating its technology by promising payments for user activity. In a mobile gaming experience where developers use Tapjoy's advertising platform, Tapjoy displays "offers." When

² Robert Williams, *Mobile gaming surges as pandemic drives 45% jump in app installs*, MARKETING DRIVE (Dec. 2, 2020), <https://www.marketingdive.com/news/mobile-gaming-surges-as-pandemic-drives-45-jump-in-app-installs/591417/>. Gaming expert Joost van Dreunen recently offered helpful analysis about emerging trends in this growing industry. The Prof G Show with Scott Galloway, *Pandemic Learnings with Dr. Abdul El-Sayed* (Dec. 15, 2020), <https://westwoodonepodcasts.com/pods/the-prof-g-show-with-scott-galloway/>.

³ See, e.g., Gil Kaufman, *Here's How Many People Tuned Into Lil Nas X's Roblox Show*, BILLBOARD (Nov. 17, 2020), <https://www.billboard.com/articles/columns/hip-hop/9485495/lil-nas-x-roblox-show-viewers>; see also Joost van Dreunen, *The future is user-generated*, SUPERJOOST PLAYLIST (Nov. 23, 2020), <https://superjoost.substack.com/p/the-future-is-user-generated>.

⁴ This matter is another example where the lack of clarity regarding the scope of immunities conferred by Section 230 of the Communications Decency Act has given legal ammunition to platforms seeking to shirk responsibility for their commercial activity, including sales and advertising practices. This lack of clarity undermines the ability of the FTC and other regulators to obtain adequate monetary relief for misconduct.

gamers complete these “offers,” such as by signing up for subscriptions or making purchases, Tapjoy credits the user’s account with coins or other currency for use in the game, and developers receive a percentage of Tapjoy’s advertising revenue.⁵

However, according to the FTC’s complaint, many players jumped through hoops—and even spent money and turned over sensitive data—to complete Tapjoy’s offers, only to receive nothing in return.⁶ It appears Tapjoy amplified false offers by its business partners, who baited gamers with big rewards only to cheat them when it was time to pay up.⁷ Tapjoy did little to clean up the mess, even when hundreds of thousands of gamers filed complaints.⁸ This also harmed developers of mobile games, who were cheated of advertising revenue they were entitled to.

In my view, Tapjoy’s conduct violated the FTC Act’s prohibition on unfair practices, as well as the prohibition on deceptive practices.⁹ The FTC’s proposed settlement requires the platform to implement screening and testing procedures to weed out advertisers that cheat gamers and developers. This provision will help ensure Tapjoy takes more responsibility for fraud, rather than facilitating it.¹⁰

Gaming Gatekeepers and Trickle-Down Abuse

Tapjoy is not the only platform squeezing developers. In fact, the firm is a minnow next to the gatekeeping whales of the mobile gaming industry, Apple and Google. By controlling the dominant app stores, these firms enjoy vast power to impose taxes and regulations on the mobile gaming industry, which was generating nearly \$70 billion annually even before the pandemic.¹¹

⁵ In other instances, users can receive rewards directly through the game.

⁶ Compl. In the Matter of Tapjoy, Inc., ¶¶ 21-29.

⁷ Compl., *id.* ¶¶ 8, 15-29.

⁸ Compl., *id.* ¶¶ 30-40.

⁹ The Commission’s proposed complaint charges Tapjoy with deception, but fails to include a charge of unfairness. However, the settlement includes injunctive relief that addresses Tapjoy’s failure to police fraud.

¹⁰ I respectfully disagree with the proposed order provision requiring Tapjoy to disclose that advertisers are responsible for issuing rewards. This disclaimer undermines the goal of ensuring that Tapjoy takes adequate responsibility for its business partners’ practices.

¹¹ See Omer Kaplan, *Mobile gaming is a \$68.5 billion global business, and investors are buying in*, TECHCRUNCH (Aug. 22, 2019), <https://techcrunch.com/2019/08/22/mobile-gaming-mints-money/>.

We should all be concerned that gatekeepers can harm developers and squelch innovation. The clearest example is rent extraction: Apple and Google charge mobile app developers on their platforms up to 30 percent of sales, and even bar developers from trying to avoid this tax through offering alternative payment systems.¹² While larger gaming companies are pursuing legal action against these practices, developers and small businesses risk severe retaliation for speaking up, including outright suspension from app stores – an effective death sentence.¹³

This market structure also has cascading effects on gamers and consumers. Under heavy taxation by Apple and Google, developers have been forced to adopt alternative monetization models that rely on surveillance, manipulation, and other harmful practices.

For example, many developers are turning to “loot boxes” to squeeze more revenue out of gamers. These loot boxes deploy dark patterns and other deceptions to lure gamers—often children—into purchasing in-app rewards of randomly assigned value, turning videogames into virtual casinos. As detailed in a recent FTC report, this addictive phenomenon emerged as a direct consequence of changing monetization models in the industry, as developers increasingly rely on recurring revenue, such as through in-app purchases, rather than upfront sales.¹⁴

Mobile gaming’s market structure is also forcing developers to create revenue streams that are not subject to app store taxation, including through intrusive behavioral advertising. Last year, for example, the FTC brought an action against Hyperbeard, a developer of child-directed games charged with allowing major ad networks to surveil

¹² See STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS at 221 (Google); 339 (Apple). Although Google allows users to “sideload” apps from outside the Play Store, it has been alleged that Google makes this process “technically complex, confusing and threatening[.]” *Id.* at 220 (quoting Epic lawsuit).

¹³ Developers have alleged retaliatory practices by both Google and Apple, such as when they have tried to circumvent these gatekeepers’ preferred monetization tools. *Id.* at 222, 348-349.

¹⁴ Press Release, Fed. Trade Comm’n, FTC Staff Issue Perspective Paper on Video Game Loot Boxes Workshop (Aug. 14, 2020), <https://www.ftc.gov/news-events/press-releases/2020/08/ftc-staff-issue-perspective-paper-video-game-loot-boxes-workshop>.

users—including children—in order to serve behavioral advertising.¹⁵ This type of conduct violates the Children’s Online Privacy Protection Act, but Hyperbeard’s surveillance practices are not unique. In fact, Google encourages game developers on its platform to adopt this monetization model, claiming “users expect free games.”¹⁶

Today’s action against Tapjoy reveals another monetization model developers turn to in the face of fees and restrictions imposed by app stores. By offering a platform connecting advertisers, gamers, and game developers, Tapjoy allows these developers to generate advertising revenue that Apple and Google do not tax. But this monetization model also creates opportunities for fraud, and the Commission’s complaint details how Tapjoy allowed this fraud to fester.

Monitoring the Middlemen

Developers of mobile games deliver creative content that keeps Americans entertained and engaged, but face many middlemen, even beyond the dominant app stores. Game developers relied on Tapjoy to generate revenue for themselves and offer gamers a way to earn currency to enhance their play. However, Tapjoy’s failure to screen fraudulent offers left both gamers and developers holding the bag.

The settlement proposed today should help reverse the lax policing practices that led hundreds of thousands of gamers to file complaints. But when it comes to addressing the deeper structural problems in this marketplace that threaten both gamers and developers, the Commission will need to use all of its tools—competition, consumer protection, and data protection—to combat middlemen mischief, including by the largest gaming gatekeepers.

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¹⁵ Press Release, Fed. Trade Comm’n, *Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids’ Data without Parental Consent* (June 4, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it>.

¹⁶ *Mobile ads: the key to monetizing gaming apps*, GOOGLE ADMOB, <https://admob.google.com/home/resources/monetize-mobile-game-with-ads/> (last visited on Jan. 5, 2021).